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CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

WILLIAM SANFORD ELEY, II AND HONORABLE
WILLIAM R. GORDON, CIRCUIT JUDGE,

Respondents

APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA;
THE COURT OF CRIMINAL
APPEALS OF ALABAMA AND THE
CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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TABLE OF APPENDICES

APPENDIX A

CIRCUIT COURT

FIFTEENTH JUDICIAL CIRCUIT

CC-82-513-G

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	OPINION AND ORDER
v.	)	
	)	
WILLIAM S. ELEY, II,	)	
	)	
Defendant	)	

The defendant is charged before this court with the offense of assault in the first degree.[1]/

On December 31, 1981, the automobile defendant was operating was involved in collision with an automobile which Karen H. Hellums was driving. Mrs. Hellums was

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[1]/ Alabama Code §13A-6-20(a)(3) provides:

"(a) A person commits the crime of assault in the first degree if:

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injured in the collision. Defendant was immediately charged by Montgomery City Police with driving under the influence (intoxicating beverages) and failure to yield the right-of-way. On January 11,

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Footnote 1 con't:

(3) Under circumstances manifesting extreme indifference to the value of human life,he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person;"

Alabama Code §13A-2-2(3) defines "recklessly", as follows:

"A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and justifiable risk that the result will occur or that the circumstances exist. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates a risk but is unaware thereof solely by reason of voluntary intoxication, as defined in subdivision (3)(2) of section 13A-3-2, acts recklessly with respect thereto." (Emphasis supplied)

1982, the municipal court of the City of Montgomery nolle prossed the failure to yield right-of-way charge, and, after a plea of not guilty, convicted the defendant of the DUI charge, fined him $250.00 plus court costs and sentenced him to thirty (30) days in the county jail, which jail term was suspended.[2]/

On April 2, 1982, defendant was indicted for the present offense arising out of the same incident. The indictment, in pertinent part, alleges, as follows:

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[2]/ Montgomery City Code, 1980, §25-68 provides:

"It shall be unlawful for any person who is under the influence of intoxicating liquors or beverages, narcotics or barbiturate drugs, or who is a habitual user of narcotics or barbiturate drugs, to operate any motor vehicle on any of the public streets, highways or passageways of the city or its police jurisdiction, or upon or over any private driveway or passageway or parking area not belonging to such operator. Upon conviction therefor, such person shall be fined not less than two hundred dollars hundred dollars or imprisoned in the city jail

"William Sanford Eley, II...., did, under circumstances manifesting extreme indifference to the value of human life, recklessly engage in conduct which created a grave risk of death to another person and did thereby cause serious physical injury to Karen H. Hellums by operating a motor vehicle while the said William Sanford Eley, II was under the influence of

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Footnote 2 con't"

for not less than ten days nor more than six months, or by both such fine and imprisonment, at the discretion of the municipal judge. As additional punishment, the municipal judge trying the case shall have the authority to prohibit the person so convicted from driving any motor vehicle upon the streets or highways of the city for a period not to exceed a year. (Ord. No. 52-72, §9-2)"

There are no lesser included offenses of driving under the influence. Ala. Code §32-5A-191(c).

This is not a case where the defendant has attempted to create double jeopardy. See: Dunaway v. State, 398 So. 2d 658 (Miss. 1981). This is also not a case where the state was unable to proceed on the more serious charge at the outset. Brown v. Ohio, 432 U.S. 161 (1977) (footnote #7). See: State v. Escabar, 633 P.2d 100 (Ct. App. Wash. 1981).

intoxicating beverages, and did cause said motor vehicle to run into, over, upon, against or collide with the motor vehicle in which the said Karen H. Hellums was driving, thereby causing serious physical injury to the said Karen H. Hellums,...."

Defendant filed a Plea of Autrefois Convict on April 29, 1982, which plea was denied by this court. Defendant then filed a Plea of Former Jeopardy grounded on Section 9 of the Constitution of Alabama, 1901, and the fifth and fourteenth amendments to the United States Constitution. This plea was heard by the court on June 28, 1982.

THE DOUBLE JEOPARDY CLAIM

The only question presented is whether defendant's conviction in the municipal court of the offense of driving

under the influence is a bar to the instant prosecution for assault in the first degree.[3]/ Traditionally, the issue would be put, under the facts of this case are the offenses of driving under the influence and assault in the first degree the same for double jeopardy purposes? An analysis of defendant's claim that the offenses are the same requires the court to explore one of the most complex and vexing areas of criminal law. The analysis undertaken by the court has been time-consuming and laborious for what appears at first blush to be an issue easily pared to its bare essentials and summarily disposed of. Such is far from the case.

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[3]/ The concept of dual sovereignty has been abolished. Waller v. Florida, 397 U.S. 387 (1970).

Defendant rests his plea on Illinois v. Vitale, 347 U.S. 410 (1980) -- with all respect, a case simply written, but with a labyrinthian result. Before examining Vitale, certain fundamental concepts of double jeopardy should be noted.

The double jeopardy clause of the United States Constitution (fifth amendment) applies to the states through the fourteenth amendment. Benton v. Maryland, 305 U.S. 784 (1939). "The constitutional prohibition of double jeopardy has been held to consist of three separate guarantees: (1) 'it protects against a prosecution for the same offense after acquittal. [(2)I]t protects against the second prosecution for the same offense after conviction. [(3)] and it protects against multiple punishments for the same offense.

(citation omitted) " Vitale at 415. This court is only concerned with the second of these guarantees.

Since 1932 the cornerstone of analysis to determine if two offenses are the same for federal double jeopardy has been the test set out in Blockburger v. United States, 284 U.S. 299, 304 (1932), as follows:

"[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." (citation omitted)

The test has been restated by various American courts. Comment, Twice In Jeopardy, 75 Yale L.J. 262 (1965).

The test is applicable to state cases. Brown v. Ohio, 432 U.S. 161 (1977). Further, the test is a rule of statutory construction to be utilized to determine if Congress intended that a single transaction would be violative of more than one statute. Albernaz v. United States, 450 U.S. 333 (1981).

Defendant concedes, as he must, that application of Blockburger to the instant case requires that the plea be overruled. However, he earnestly contends that Vitale has modified Blockburger and that application of the modified test requires the court to sustain the plea.

Additionally, prior to Vitale, there is little reason to question but that under the facts of the case sub judice, the plea fails. See: United States v. DeCoteau, 516 F.2d 16 (8th Cir. 1975), and United States v. DeMarrias, 441 F.2d 1304

(8th Cir. 1971))both cases holding that a prior conviction for driving while intoxicated did not bar on double jeopardy grounds a subsequent prosecution for involuntary manslaughter). See also: United States v. Kills Plenty, 466 F. 2d 240 (8th Cir. 1972) (there is no double jeopardy bar to a subsequent prosecution for involuntary manslaughter after an acquittal of driving while intoxicated). But ct.: Humphries v. Wainwright, 584 F.2d 702 (5th Cir. 1978) (a prior acquittal of driving while intoxicated collaterally estopps [Ashe v. Swenson, 397 U.S. 436 (1970)] a subsequent prosecution for vehicular manslaughter by intoxication), and Bacom v. Sullivan, 200 F. 2d 70 (5th Cir. 1952), cert. denied, 73 S.Ct. 651 (1953). See: Annot., 25 L.Ed2d 968 (1970). An excellant pre-Vitale discussion of why a prior

conviction of driving intoxicated is not a bar to a charge of manslaughter resulting from operating an automobile while intoxicated is contained in State v. Stiefel, 256 So.2d 581 (Fla. Dist. Ct. App. 19720.

THE TRADITIONAL ALABAMA TEST

In Echols v. State, 35 Ala. App. 602 (Crim. App. 1951), Echols was convicted, of leaving the scene of an accident on appeal he contended, inter alia, that the lower court erred in not sustaining a plea of autrefois convict because he had previously been convicted of manslaughter growing out of the same incident. The court, relying on Brown v. State, 200 So. 630 (Ala.1941), set out the test, as follows:

> "[W]hether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the *first indictment. In other* words, in determining whether both indictments charge the same offense, the test

> generally applied is that when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution would be a bar to the first...."

The court concluded that the plea was properly overruled because the second offense (manslaughter) was completed before the second (leaving the scene of an accident) occurred. The Echols test comports with Blockburger in that proof of leaving the scene requires proof of an additional fact, i.e., an accident and defendant leaving the scene.

The state cites Green v. State, 389 So. 2d 537 (Crim. App.), cert. denied, 389 So. 2d 541 (Ala. 1980), as authority that the defendant's plea should be denied. In Green a search of Green's residence resulted in the seizure of numerous controlled substances. The defendant was tried in municipal court

for misdemeanor possession of marijuana (one of the controlled substances seized) and her case taken under advisement. Upon indictment in seven counts for possession of seven different controlled substances (there was no count for possession of marijuana), defendant filed a plea of former jeopardy which the trial court overruled, and this was assigned as error on appeal. At page 538 the Court of Appeals utilized the Blockburger test as expressed in Hattaway v. United States, 399 F.2d 431 (5th Cir. 1968), in holding the offenses were not the same because of the "distinct elements of one prosecution that are not present in the other," i.e., proof of each different controlled substance. Green could have probably been more easily disposed of by relying on Little v. State, 339 So. 2d 1071 (Crim. App. 1976). Little was

indicted for the offense of involuntary manslaughter by automobile and also charged with reckless driving growing out of the same accident. After conviction in municipal court of the offense of reckless driving, Little filed a plea contending that the prosecution of manslaughter should be barred on double jeopardy grounds. However, Little had appealed the reckless driving conviction to circuit court for trial de novo. Thus, the court of appeals found that Little had not been placed in jeopardy because there was no conviction. It is most interesting to note, albeit dicta, that the court said that although reckless driving may be a component (element?) of second degree manslaughter, it is not the same offense.

In Green the defendant was found guilty as charged (seven count indictment

for possession of controlled substances) and sentenced to a term of imprisonment of three (3) years. Green is difficult to reconcile with the unreported case of Vogel v. State, ____ So. 2d ____ (Crim. App. October 28, 1980) aff'd, Ex parte Vogel, ____ So. 2d ____ (Ala. July 23, 1982) rehearing pending. The Vogel brothers were indicted for fourteen counts of violating the Alabama Uniform Controlled Substances Act by being in position of a number of different controlled substances on the same occasion. Upon being adjudged guilty, they were sentenced on each count of the indictment. Defendants contended on appeal that the multiple sentences ran afoul of the double jeopardy clause since under the facts of the case only one offense was committed whereas multiple punishments were imposed. The Court of

Appeals agreed and said, as follows:

> "It is thus our holding that where, as here, there is but a single point of control in time and place over several types of controlled substances, only a single offense has been committed, the offense of possession of controlled substances, and only one sentence is authorized?"

Other than the fact that in Green the controlled substances were seized from a residence and in Vogel they were seized from a vehicle, the cases are factually on all fours, except the manner in which the jeopardy claim arose. Neither the Vogels nor Green was indicted for possession of marijuana. Marijuana is a controlled substance just as were the other substances for the possession of which the persons were indicted. The court in Green at 538 refers to a difference in proof required to prove a simple possession of marijuana as

opposed to that required to prove possession of some other controlled substance, however, the proof required is the same. The state must prove that the substance was possessed by the defendant and that it was a controlled substance. See: Cook v. State, 341 So. 2d 183 (Crim. App. 1977) and DeGruy v. State, 323 So.2d 406 (Crim. App. 1975). In any event, to reach the result in Green, the court held that there were multiple offenses and not one. In view of the holding in Vogel, Green is questionable and not good authority for the state's position in the case sub judice.

The lesson in Vogel as it relates to the issue before this court is that there was only one act of possession, and, therefore, only one offense for which the Vogels could be punished. In the instant case the argument that there were two

separate acts has substance. The basis of the argument is that driving under the influence was an act completed prior to the collision, and, therefore, the assault. Echols v. State, supra. However, it must be considered in light of Vitale.

In other double jeopardy decisions the Alabama Supreme Court has couched the test in terms of offenses being the same for double jeopardy purposes only if they are the same in law and fact (the identity test). Racine v. State, 291 Ala. 684 (Ala. 1973). See those cases collected in Vol. 5B, Ala. Digest, Criminal Law, Key No. 195(1). It is obvious that under the test in Racine, supra, the plea in the instant case should be denied.

THE ALABAMA CRIMINAL CODE

The Alabama Criminal Code (Alabama Code §§13a-1-1, et seq.) recognizes that the same conduct of the defendant may establish the commission of more than one offense, but also provides that under certain circumstances the defendant may not be convicted in successive prosecutions for the same conduct. §13A-1-8(b). One of the circumstances is where the offenses are included within the other.

The elements of assault in the first degree are: (1) that the victim suffered a serious physical injury, (2) that the serious physical injury was caused by the defendant, and (3) that in causing such injury the defendant acting under circumstances manifesting extreme indifference to the value of human life, recklessly engaged in conduct which

created a grave risk of death to any person. Alabama Pattern Jury Instructions, Criminal, Page III-C-22. The elements of driving under the influence of intoxicating beverages are: (1) defendant was operating a motor vehicle, and (2) was under the influence of intoxicating beverages. Montgomery City Code 1980, §25-68. Examining the statutory elements of the offense only leads the court to the conclusion that driving under the influence is not a lesser included offense of assault in the first degree and since no other subsections of §13A-1-8(b) would prohibit the instant prosecution, the statute would not be a bar. However, the court must consider, infra, whether under the indictment, as framed, driving under the influence is a species of a lesser included offense.

ILLINOIS V. VITALE, 347 U.S. 410 (1980)

Vitale (a juvenile) operated a vehicle which struck and killed two small children. He was immediately charged and convicted of the traffic offense of failing to reduce speed to avoid an accident in violation of the Illinois Vehicle Code (a petty offense under Illinois law). The day following his conviction of the traffic offense, Vitale was charged in the juvenile court with two counts of involuntary manslaughter (a felony under Illinois law). The petition alleged that Vitale "without lawful justification while recklessly driving a motor vehicle caused the death of the two children...." Vitale at 412. Vitale filed a motion to dismiss the petition grounded on statutory and/or constitutional double jeopardy grounds. The juvenile court dismissed the petition

as being barred by Illinois statutes that required that all offenses based on the same conduct be prosecuted in a single prosecution (compulsory joinder statute). This ruling was affirmed by the Illinois Appellate Court. The Illinois Supreme Court affirmed, basing its decision squarely on the double jeopardy clause of the fifth amendment. The United States Supreme Court remanded to the Illinois Supreme Court for that Court to determine (which it had already done, but not to the United State Supreme Court's satisfaction) whether under Illinois law careless failure to slow is always a necessary element of manslaughter. Vitale at 419. The court specifically remanded the case with the following language:

> "Because of our doubts about the relationship under Illinois

> law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the state will rely on to prove manslaughter are still unknown, we vacate the judgment of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion." 347 U.S. at 421 (emphasis supplied)

The emphasized language together with other language in the opinion, gives rise to some uncertainty concerning the holding[4]/ and its proper application to the instant case.

At oral argument on defendant's plea, all counsel agreed that if the only

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[4]/The uncertainty is probably exemplified by the fact that, according to information developed by the court and current some thirty days ago, the Illinois Supreme Court considered Vitale for approximately six months and remanded the case to the juvenile division of the Circuit Court of Cook County, Illinois, for proceedings not inconsistent with the opinion of the United States Supreme Court. The case remains in the breast of the juvenile court.

reckless act to be relied upon by the state to sustain its prosecution is driving under the influence of intoxicating beverages, Vitale would compel that the plea be sustained. Counsel further agree that driving under the influence is not always a statutory element of assault in the first degree. The state represented that in addition to evidence of intoxication, at trial it expects to introduce evidence of speeding, inattentive driving, running a blinking red light and failure to yield the right-of-way, thereby avoiding the bar of the double jeopardy clause.

As a further aid to the court, counsel were subsequently required to file written briefs on the issue of whether the state is required to prove that defendant was driving under the

influence of intoxicating beverages or suffer an acquittal. Defendant argued that the state must and the state conceded the point.

Against the factual posture of the case, Vitale must be examined.

Much of the language of Vitale comports with the Blockburger test and its recent progeny, vix., Brown v. Ohio, 432 U.S. 161 (1977) and Harris v. Oklahoma, 433 U.S 682 (1977). The court spoke in terms of whether failure to slow was always a necessary element of manslaughter which language is compatible with its prior holdings that the court must examine the abstract proof necessary to sustain the statutory elements of the offense and not the actual evidence to be adduced at trial. Vitale at 419. However, in the same breath, the court then used certain language which appears

to indicate quite the opposite at page 419, as follows:

> "If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the" 'same' "under Blockburger, and Vitale's trial on the latter charge would constitute double jeopardy under Brown v. Ohio. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma." (citation omitted) (emphasis supplied).

Although the majority stopped short of concluding that under these circumstances the prosecution would be barred, Justice Stevens was not so restrained in his dissent (joined by

Justice Brennan, Steward and Marshall) when he concluded at page 426, as follows:

> "In part IV of its opinion the court states that, even if the Illinois Supreme Court should hold on remand that failure to reduce speed is not always a lesser-included offense as a matter of state law, respondent will still have a single "substantial" double jeopardy claim if the state finds it necessary to rely on his failure to reduce speed in order to sustain its manslaughter case. In my opinion such a claim would not merely be 'substantial'; it would be dispositive." (emphasis supplied)

It is the quoted language of the majority when considered with Justice Steven's dissent which the defendant says signals the court's retreat from the abstract proof test of Blockburger; and requires the court to sustain the plea.

The Supreme Court's decisions in Brown and Harris each considered offenses

which embraced lesser included offenses, or a species of lesser included offense. In the instant case the court would not ordinarily conclude that driving under the influence of intoxicating beverages is a lesser included offense of assault because it includes elements not embraced in assault, although it may be a component of the actual proof. In order for an offense to be a lesser included offense for purposes of charging on lesser included offenses, each element of the lesser offense must be included in the higher offense. Mayes v. State, 350 So. 2d 339 (Crim. App. 1977). To be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without having first having committed the lesser. Sharpe v. State, 340 So. 2d 885

(Crim. App.), cert. denied 340 So. 2d 889 (Ala. 1976). The comments of §13A-8-1(b) note that this subsection follows prior Alabama law.

In Vitale, the court noted that the Brown decision rested on a finding that for a conviction of a lesser included offense to preclude later prosecution for the greater offense, it was essential that the elements of the lesser included offense prove the greater offense, and, also, that proof of the greater offense likewise prove the lesser included offense. In Harris, the court likewise found that where the conviction of the greater offense could not be had without proof of the lesser included offense, prosecution for the greater offense is barred. The Harris court referred to the underlying felony as a "species" of lesser included offense in reaching its

conclusion, and Harris appears to be more analogous to the case at bar. When the court in Vitale concludes that "in any event" it may be that failure to slow is not always a necessary element of the offense of manslaughter, it is then saying that failure to slow may be a species of lesser included offense, and if it must be proved to succeed to verdict on the greater offense -- the prosecution for the greater offense is barred. This language also permits the court to examine the actual evidence to be adduced at trial rather than the abstract proof necessary to prove the statutory elements of assault.

In the instant case the state has conceded that because the element of recklessness has been described in the indictment as driving under the influence of intoxicating beverages, it must prove

defendant was driving under the influence or suffer an acquittal. The reasoning of Harris and Vitale addresses itself to such a situation inasmuch as under the indictment as framed the state must prove conduct for which defendant has already been convicted to prove the greater offense, and, thus, the state has made driving under the influence a species of lesser included offense and prosecution for the greater offense is barred.

Defendant invites this court to go further and find that the state is precluded from offering any evidence whatsoever that defendant was intoxicated. The court must decline that invitation since under this holding it need not reach that issue.

It is, therefore, ORDERED that defendant's plea of former jeopardy is

well taken and that the indictment, as framed, is DISMISSED.

DONE and ORDERED in chambers this 1st day of September, 1982.

/s/
WILLIAM R. GORDON
Circuit Judge

District Attorney
Edward Parker

ORDER OF COURT DISMISSING INDICTMENT

WEDNESDAY, SEPTEMBER 1, 1982

COURT MET PURSUANT TO ADJOURNMENT

PRESENT THE HONORABLE WILLIAM R. GORDON, JUDGE PRESIDING

STATE OF ALABAMA

VS. CC-82-513-G OFFENSE - ASSAULT I

WILLIAM SANFORD ELEY, II

This day came the State by its District Attorney and came also the defendant in his own proper person and by his attorney, Honorable Maury Smith, and it appearing to the court that the defendant heretofore filed a plea of former jeopardy, and upon consideration of same, it is ordered by the court that defendant's plea of former jeopardy is well taken and that the indictment, as framed, is dismissed.

APPENDIX B

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

3 DIV. 740

Ex parte State of Alabama

In re: State of Alabama v. William Sanford Eley, II

PETITION FOR WRIT OF MANDAMUS

Montgomery Circuit Court

IT IS ORDERED that the petition for writ of mandamus be and the same is hereby denied. All the Judges concur.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 10th day of January, 1983.

/s/
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

3 DIV. 740

Ex parte State of Alabama

In re: State of Alabama v. William Sanford Eley, II

PETITION FOR WRIT OF MANDAMUS

Montgomery Circuit Court

IT IS ORDERED that the request for finding of additional facts by and the same is hereby denied.

IT IS FURTHER ORDERED that the application for rehearing be and the same is hereby overruled.

All the Judges concur.

WITNESS, Mollie Jordan, Clerk OF the Court of Criminal Appeals, this 24th day of January, 1983.

/s/
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX C

MAILING ADDRESS:

P. O. Box 157
Montgomery, Alabama 36101

TELEPHONE:
832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 8, 1983

Re: 82-414

Ex Parte: State of Alabama
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(Re: Ex Parte: State of Alabama
Petition for Writ of Mandamus)

Appellant

vs.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____Appell____ granted 7 additional days to file briefs to and including

_____Appellant(s) granted 7 additional days to file reply briefs to and including

_____Record on Appeal filed

_____Appendix Filed

_____Submitted on Briefs

XXXXXPetition for Writ of Certiorari denied. No opinion.

SHORES, J. -- ALL THE JUSTICES CONCUR.

_____Application for rehearing overruled. No opinion written on rehearing.

_____Permission to file amicus briefs granted.

_____

/s/
Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

APPENDIX D

CODE OF ALABAMA, 1975
TITLE 13A

§13A-6-20. Assault in the first degree.

(a) A person commits the crime of assault in the first degree if:

(1) With intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument; or

(2) With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such an injury to any person; or

(3) Under circumstances manifesting extreme indifference to the value of human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person; or

(4) In the course of and in furtherance of the commission or attempted commission of arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life, or of immediate flight therefrom, he causes a serious physical injury to another person.

(b) Assault in the first degree is a Class B felony. (Acts 1977, No. 607, p. 812, §2101.)

APPENDIX E

MONTGOMERY CITY CODE

Sec. 25-68. Driving under the influence of drugs, etc.

It shall be unlawful for any person who is under the influence of intoxicating liquors or beverages, narcotics or barbiturate drugs, or who is a habitual user of narcotics or barbiturate drugs, to operate any motor vehicle on any of the public streets, highways or passageways of the city or its police jurisdiction, or upon or over any private driveway or passageway or parking area not belonging to such operator. Upon conviction therefor, such person shall be fined not less than two hundred dollars or imprisoned in the city jail for not less than ten days nor more than six months, or by both such fine and imprisonment, at the discretion of the municipal judge. As additional punishment, the municipal judge trying the case shall have the authority to prohibit the person so convicted from driving any motor vehicle upon the streets or highways of a city for a period not to exceed one year. (Ord. No. 54-72, §9-2.)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of May, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for William Sanford Eley, II and Honorable William R. Gordon, Circuit Judge, Respondents, by mailing same to him, first class postage

prepaid and addressed as follows:

Honorable Maury Smith
P. O. Box 78
c/o Smith, Bowman, Thagard, Crook
and Culpepper
Attorneys at Law
2 Dexter Avenue
Montgomery, Alabama 36101

JOSEPH G. L. MARSTON, III
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